Nos. 86-152, 86-153 and 86-154

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In the Supreme Court of the United States

OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE, PETITIONER

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, ET AL.

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v.

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ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA, SECOND, AND NINTH CIRCUITS

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts of appeals correctly held that the Glass-Steagall Act, 12 U.S.C. 24 (Seventh), 377, 378 and 78, does not prohibit national banks from establishing a common trust consisting of the trust assets of Individual Retirement Accounts.

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OPINIONS BELOW

In No. 86-152, the opinion of the court of appeals (Pet. App. 1a-23a) is reported at 790 F.2d 925. The opinion of the district court (Pet. App. 24a-38a) is reported at 596 F. Supp. 1496. In No. 86-153, the opinion of the court of ap-

peals (Pet. App. 1a-6a) is reported at 793 F.2d 220. The opinion of the district court (Pet. App. 7a-27a) is reported at 593 F. Supp. 846. In No. 86-154, the opinion of the court of appeals (Pet. App. 1a-3a) is reported at 789 F.2d 175. The opinion of the district court (Pet. App. 4a-11a) is reported at 630 F. Supp. 593.

JURISDICTION

In No. 86-152, the judgment of the court of appeals was entered on May 20, 1986. In No. 86-153, the judgment of the court of appeals was entered on June 30, 1986. In No. 86-154, the judgment of the court of appeals was entered on May 2, 1986. The petitions for writs of certiorari were filed on July 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1913, Congress gave national banks the authority to exercise trust powers under the supervision of the Federal Reserve Board. See Federal Reserve Act, ch. 6, § 11(k), 38 Stat. 262. In 1936, the Board specifically authorized national banks to establish common trust funds. See 1 Fed. Reg. 417 (1936). Such a fund is a device by which a bank commingles the assets of individual trusts to be invested collectively as a single trust. See 12 C.F.R. 9.18(a)(1). The bank, as trustee, exchanges the assets of each participating trust for an undivided interest in the common trust that is proportionate to the assets contributed by the individual participating trust. See 1 Fed. Reg. 420 (1936).[1]

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[1] In 1962, Congress transferred to the Comptroller of the Currency the authority to supervise the trust activities of national banks. See Pub. L. No. 87-722, § 1, 76 Stat. 668, codified at 12 U.S.C. 92a. The Comptroller's present regulations authorizing banks to maintain common trust funds are codified at 12 C.F.R. 9.18.

For many years, national banks have used the common trust fund as a vehicle to commingle and invest the assets of various employee retirement programs. See *Internal Revenue Code of 1954: Hearings on H.R. 8300, Before the Senate Comm. on Finance,* 83d Cong., 2d Sess. Pt. 4 2115-2116 (1954). These funds, consisting of the assets of employee retirement programs, are common trusts, often referred to as collective investment trusts. See 12 C.F.R. 9.18(b); 20 Fed. Reg. 3305 (1955). As Congress expanded the class of employee retirement plans, banks continued to invest plan assets in common trust funds. After the passage of Keogh legislation in 1962 permitting self-employed individuals to establish their own retirement plans (see Pub. L. No. 87-792, 76 Stat. 809 *et seq.*), for example, banks, as trustees, invested the assets of individual Keogh plans in bank common trust funds. See H.R. Rep. 2337, 89th Cong., 2d Sess. 36 n.24 (1966); 45 Fed. Reg. 8960, 8968 (1980).

In 1974, as part of the Employees Retirement Income and Security Act (ERISA), 26 U.S.C. 401 *et seq.*, Congress created another form of employment-related retirement trust, the so-called individual retirement account (IRA). ERISA requires that each IRA be established by a written trust agreement, and provides that only banks (or other persons specially approved by the Secretary of the Treasury) may serve as IRA trustees. See 26 U.S.C. 408(a). ERISA also expressly provides that a bank may commingle individual IRA trust assets "in a common trust fund or common investment fund." 26 U.S.C. 408(a)(5).[2] In 1981, Congress amended ERISA to increase substan-

[2] ERISA includes numerous restrictions to ensure that an IRA trust is used solely for retirement purposes. Among other things, IRA trust assets may not be invested in items unsuitable for retirement purposes. See 26 U.S.C. 408(a)(3) and (m). In addition, a 10% penalty is imposed on any distribution of IRA trust assets before the settlor reaches age 59½. 26 U.S.C. 408(f).

tially both the number of people who may open IRAs and the amount that each individual may contribute annually to his IRA. See Pub. L. No. 97-34, § 311, 95 Stat. 274; 26 U.S.C. 408(a)(1).

2. Citibank is a national bank located in New York. In 1982, Citibank established its current IRA trust program. Among the IRA trust alternatives offered by Citibank is a common trust fund known as the Collective Investment Trust, which consists of the commingled assets of individual IRAs. Each participating IRA receives a proportionate interest in the Collective Trust, the assets of which are invested in several stock portfolios. Citibank is the trustee of the common trust and acts as investment advisor, administrator, and custodian of the trust.[3] Pet. App. 4a-5a.[4]

On October 21, 1982, the Comptroller of the Currency approved Citibank's application to offer the Collective Trust for IRA trusts (Pet. App. 39a-51a). The Comptroller first determined that, because Citibank's Collective Trust was a common trust within the meaning of his regulations, Citibank had the authority to offer it as a fiduciary service (see *id.* at 40a). Relying on this Court's decision in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971), the Comptroller then concluded that "the prohibitions of the Glass-Steagall Act [12 U.S.C. 24 (Seventh), 377, 378, and 78] do not apply to a bank's collectively investing IRA trust assets in the manner proposed here" (Pet. App. 42a), In *Camp*, the Comptroller noted, this Court held that the Glass-Steagall Act prohibited a national bank from marketing securities representing interests in collectively invested funds held by the bank in

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[3] The Collective Trust is a common trust fund under the Comptroller's regulation (12 C.F.R. 9.18(a)) and is established as a trust under New York law.

[4] Unless otherwise noted, citations to "Pet. App." and "Pet." are to those filed in No. 86-152.

managing agency accounts (*id.* at 42a-43a). But in invalidating that commingling of managing agency accounts, the Comptroller explained, the Court in *Camp* specifically indicated that " '[f]or at least a generation . . . there has been no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds' " (*id.* at 43a (quoting *Camp*, 401 U.S. at 624)). Thus, the Comptroller emphasized, the Court in *Camp* "recognized that banks have traditionally commingled trust assets, thereby distinguishing the offering of such fiduciary services from the commingled agency account in [*Camp*]" (Pet. App. 42a). The Comptroller accordingly concluded that "[s]ince the IRA assets in the present case will be received by the Bank as trustee, in both a common-law sense and within the meaning of ERISA, the collective investment of IRA trust assets * * * is clearly sanctioned by * * * *ICI* v. *Camp*" (*id.* at 43a).

The Comptroller went on to reject the proposition that the registration of the IRA trusts (as well as of participations in the common fund) under the Securities Act established that the bank was issuing "securities" for purposes of the Glass-Steagall Act (Pet. App. 43a-44a). The Comptroller noted that "[t]his Office has viewed the meaning of the term 'securities' under the securities laws as not necessarily synon[y]mous with its meaning under the Glass-Steagall Act," explaining that "when, as in the present case, the 'securities' merely represent the formal manifestation of a traditional banking service, * * * the prohibitions of the Glass-Steagall Act are not applicable" (*id.* at 44a).

While this analysis was enough to dispose of the possibility that the Glass-Steagall Act bars Citibank's operation of the Collective Trust, the Comptroller alternatively considered whether the bank's trust activities would implicate the potentials for abuse that concerned

this Court in *Camp* (see Pet. App. 44a-45a). The Comptroller concluded that those potential difficulties were "nonexistent or negligible in the context of commingled IRA trusts" (*id.* at 44a), explaining that the restrictions on the operation of IRA trusts—as well as "[t]he insulation of the trust department from confidential information obtained in the commercial lending business"—reduces the likelihood of abuse (*id.* at 45a).

On the basis of his reasoning in the decision approving Citibank's application, the Comptroller subsequently issued opinions appoving the applications of Wells Fargo Bank (see Pet. App. 52a-66a), Bank of California (*id.* at 67a-68a), and the Connecticut Bank and Trust Company (*id.* at 69a-90a) to offer identical IRA common trust services.

3. Petitioner, a trade association of investment companies, investment advisers, and underwriters, brought three separate actions challenging the Comptroller's decisions in the United States District Courts for the District of Columbia, the Northern District of California, and the District of Connecticut. In each case, petitioner asserted that the Glass-Steagall Act prohibits national banks from commingling the assets of IRA trust accounts. In particular, petitioner argued that, in commingling IRA trust assets and giving each settlor a participating interest in the common trust fund, the bank was engaged in the "underwriting" and "distributi[on]" of "securities," activities forbidden to national banks by Sections 16 and 21 of the Glass-Steagall Act (12 U.S.C. 24 (Seventh), 378).

a. In No. 86-152, which involves the challenge to Citibank's common IRA trust, the United States District Court for the District of Columbia rejected petitioner's Glass-Steagall claim (Pet. App. 24a-37a). The court reasoned that the Comptroller's interpretation was supported by *Camp*, which had expressly approved of a bank's commingling of assets held in a common trust (*id.*

at 30a). The court also rejected as inconsistent with *Camp* petitioner's argument that registration of the participations in the IRA common trust as securities under the Securities Act established that the bank was underwriting "securities" within the meaning of the Glass-Steagall Act. The court reasoned that the definition of "securities" in the Securities Act is broad enough to include *all* interests in bank common trust funds. See *ibid.* Thus, the court observed, accepting petitioner's contention would mean that *all* bank common trust activities would be barred by the Glass-Steagall Act. Such a result, the court concluded, was inconsistent with *Camp*, where the Court made clear that a bank may commingle trust assets for a fiduciary purpose. See *ibid.*

The court then analyzed (Pet. App. 33a-35a) Citibank's IRA trust activities in light of the potential hazards that concerned the Court in *Camp*. The court noted that both ERISA and the Comptroller's regulations place stringent limitations on Citibank's activities, prohibiting loans by Citibank to the trust or to individuals holding an interest in the trust, and ensuring that the bank offers only trust services (*id.* at 34a-35a). The court therefore found that the only risks involved in Citibank's operation of an IRA common trust are those present "when a bank engages in its customary fiduciary functions" (*id.* at 35a). For these reasons, the court concluded that "the Comptroller was correct and acted reasonably when he ruled that the Citibank [trust] involved none of the Glass-Steagall hazards enumerated in *Camp*" (*ibid.*).

The District of Columbia Circuit affirmed (Pet. App. 1a-23a). Initially, the court rejected petitioner's argument that the Comptroller's ruling was invalid under *Camp*, finding Citibank's fund "quite distinct from the funds at issue in *Camp*" (*id* at 8a). See *id.* at 8a-12a. The court noted that in this case Citibank sought to commingle IRA trust assets in a common trust—an activity specifically ap-

proved in *Camp*—and that Citibank serves as trustee, rather than managing agent, of the common fund. *Id.* at 8a-9a. The court also noted that accepting petitioner's broad reading of the word "securities" in the Glass-Steagall Act would effectively prohibit all commingling of trust funds by banks. This, the court concluded, was inconsistent with the express approval of such activities in *Camp*. See *id.* at 11a-12a.[5]

The court then turned to the Comptroller's opinion. While it found that neither the language (Pet. App. 14a-16a) nor the legislative history (*id.* at 16a-17a) spoke to the precise question at issue here, the court found that the Comptroller's "thorough justification of his conclusion is quite reasonable" (*id.* at 22a). The court noted that the Comptroller, in approving the Citibank fund, had followed the analysis set out in *Camp* (*id.* at 19a-20a). The court also rejected petitioner's argument that the individual IRA trusts were not in fact offered for fiduciary

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[5] The court also identified other significant differences between this case and *Camp*. First, the court noted (Pet. App. 10a) that IRA contributions are limited to $2,000, while investors in *Camp* could invest up to $500,000 (see 401 U.S. at 622). This small amount contributed by each individual here, the court concluded, made it unlikely that a bank would be tempted to engage in unsound lending practices to attract borrowers. Second, the court noted (Pet. App. 10a) that under ERISA (26 U.S.C. 408(e)(4)) units in Citibank's trust could not be used as collateral, in contrast to the units of participation issued in *Camp*. Thus, the bank could not finance purchases of units in the trust by a loan secured with units already held. Third, the court observed (Pet. App. 10a) that, unlike those in *Camp* (see 401 U.S. at 622), the units in Citibank's common trust were nontransferable, permitting Citibank to retain control over the size of the trust. Finally, the court noted (Pet. App. 10a-11a) that the 10% penalty imposed by ERISA for early withdrawals from an IRA significantly reduces the risk that Citibank will be called upon to redeem a large number of units at any time, a fear present in *Camp* (see 401 U.S. at 636).

purposes (*id.* at 20a-21a). Finally, the court rejected (*id.* at 22a) petitioner's contentions that the Comptroller had disregarded the hazards discussed in *Camp*, had based his decision on a disagreement with *Camp* or the congressional intent underlying the Glass-Steagall Act, and had attempted to substitute a regulatory scheme for the statutory limits in the Glass-Steagall Act. The court found that these claims were based on "mischaracterization[s] of the Comptroller's ruling" (*ibid.*).

b. In No. 86-153, petitioners brought an action in the United States District Court for the Northern District of California challenging the permission granted Wells Fargo Bank and Bank of California by the Comptroller to operate IRA common trusts (Pet. App. 52a-66a, 67a-69a). The district court invalidated the Comptroller's decision (86-153 Pet. App. 7a-27a). A divided panel of the Ninth Circuit reversed (*id.* at 1a-6a). The court of appeals noted that "the issue the Comptroller was required to decide essentially involved questions of expert judgment regarding the practical operation of the banking industry and the results that might be anticipated if particular business practices were instituted" (*id.* at 3a). After considering the language of the statute and the rationale set forth in the Comptroller's opinion, the court concluded that "we cannot say that the analysis and conclusions set forth in the Comptroller's decisions are unreasonable" (*ibid.*).

c. In No. 86-154, petitioner brought an action in the United States District Court for the District of Connecticut challenging the Comptroller's decision to grant the IRA trust application filed by the Connecticut Bank and Trust Company (see Pet. App. 69a-90a). The district court upheld the Comptroller's ruling. 86-154 Pet. App. 4a-12a. The court first noted (*id.* at 6a) that this Court's decision in *Camp* made clear that banks may commingle trust funds. The court then rejected petitioner's contention that the bank had not received the IRA funds for a true

fiduciary purpose. *Id.* at 7a-8a. Finally, the court held that the "concerns that motivated the Congress to adopt the Glass-Steagall Act are no more present in the [IRA trust] Fund than in the traditional common trust funds * * * whose legality is conceded by [petitioner]" (*id.* at 9a). The Second Circuit affirmed for the reasons given by the district court (*id.* at 1a-3a).

ARGUMENT

In the decisions below, the courts of appeals unanimously rejected petitioner's claim that the Glass-Steagall Act prohibits a national bank from pooling IRA trusts into a common trust fund. These decisions plainly are correct. They are consistent with, and indeed are compelled by, this Court's decision in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971), which made clear that nothing in the Glass-Steagall Act prohibits national banks from commingling assets held in trust and placing these commingled assets into a common trust. In these circumstances, further review is not warranted.[6]

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[6] Given the unanimity among the circuits, there is no merit to petitioner's call (Pet. 10-11) for guidance from this Court. By splicing together quotations and taking them out of context, petitioner tries to create the impression (Pet. 11 n.14) that some court of appeals judges have called for this Court to review the matter. For example, petitioner claims that Justice (then Judge) Scalia stated that the case is " 'such an important one that it bears a petition for certiorari' " (Pet. 11 n.14, quoting Pet. App. 117a). Petitioner fails to note the remainder of Justice Scalia's comment: "The Court is going to turn it down until there is a circuit conflict" (Pet. App. 117a). Petitioner also states that "the Ninth Circuit agreed that the issues raised should be decided 'ultimately [by] the Supreme Court' " (Pet. App. 11 n.14, quoting Pet. App. 113a). The Court will search in vain for any such comment by the Ninth Circuit. In fact, the comment made by one of the Ninth Circuit judges during oral argument was "[l]et's *suppose* that ultimately the Supreme Court *were to decide* [the issue]" (Pet. App. 113a (emphasis added)).

1. Petitioner's primary argument (Pet. 12-13) is that the Comptroller's decision authorizing national banks to pool trust assets conflicts with this Court's decision in *Investment Company Institute* v. *Camp, supra.* In fact, as the courts of appeals uniformly recognized, the decision in *Camp* directly supports the Comptroller's decision.

a. In *Camp,* the Court addressed a plan in which numerous individual investors each tendered between $10,000 and $500,000 to a bank together with an authorization making the bank the investor's managing agent. See 401 U.S. at 622. The bank pooled these individual contributions into a single fund, which it then invested. The bank also issued units of participation representing each customer's share of the fund's assets. *Ibid.* The bank did not receive the investors' money in trust (*id.* at 622 n.8). The investors' interests in the fund were freely redeemable by the customer at any time, and were freely transferable (*id.* at 622). In these circumstances, the Court held that the bank's activities constituted a violation of Sections 16 and 21 of the Glass-Steagall Act. The Court reasoned that the activities engaged in by the bank were similar to the offering of shares in a mutual fund, the business of investment banking. See *id.* at 625, 629-630.

In reaching this result, however, the Court in *Camp* expressly contrasted the impermissible pooling of money for investment purposes with the permissible and well-established pooling and collective investment of trust assets. The Court specifically noted that "[f]or at least a generation * * * there has been no doubt that a national bank can, consistently with the banking laws, commingle trust funds," and that "[n]o provision of the banking law suggests that it is improper for a national bank to pool trust assets * * *." *Camp*, 401 U.S. at 624-625. Since deciding *Camp*, the Court has reaffirmed that nothing in

the Glass-Steagall Act prohibits banks from commingling and investing the trust funds of customers. See *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 55 (1981).[7]

It accordingly is manifest that the Comptroller's decision to permit national banks to commingle the assets of their IRA trusts is supported by this Court's decision in *Camp*. The Comptroller has authorized banks to "pool trust assets" (*Camp*, 401 U.S. at 625), the very activity that

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[7] Petitioner repeatedly claims (Pet. 12-13) that the Glass-Steagall Act and this Court's decisions in *Camp* and *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137 (1984), flatly prohibit banks from underwriting securities. This assertion, however, simply begs the question whether the commingling of IRA trust assets by the bank in fact constitutes the unlawful underwriting of securities. As our discussion of *Camp* demonstrates, this Court already has recognized the legality of this activity. Moreover, petitioner's repeated contention (Pet. 12, 14) that there is no trust "exception" in the Act mischaracterizes the inquiry here. The proper question in this case is whether the Act was intended to bar the traditional banking activity of commingling trust assets. *Camp* unequivocally provides a negative answer to that question.

Camp also disposes of petitioner's argument (Pet. 13 n.18) that registration of the trust units as "securities" under the securities laws renders the activity unlawful under the Glass-Steagall Act. In petitioner's view, "any ownership interest in a bank's common trust fund would constitute a security, and all commingling of trust funds by national banks would be effectively prohibited" (Pet. App. 11a). That result is flatly inconsistent with the Court's approval of these activities in *Camp* (see 401 U.S. at 624-625). Petitioner attempts to avoid this anomaly (Pet. 14 n.19) by arguing that banks could continue to commingle trust funds if they refrained from issuing or distributing interests in the common fund. But it is impossible to commingle and invest trust assets without issuing units of participation to the individual settlors to define their interest in the common trust. See 1 Fed. Reg. 420 (1936). Although the Securities and Exchange Commission (SEC) does apply its registration requirements to IRA common trust funds, it has taken no position on whether banks may offer these services under the Glass-Steagall Act. See Pet. App. 106a.

the Court stated in *Camp* was fully consistent with the banking laws. And there is no need for the Court to review the propriety of activities that it already has recognized to be permissible ones that "[b]lanks have engaged in * * * for decades" (*Board of Governors* v. *Investment Company Institute*, 450 U.S. at 55).[8]

2. Petitioner challenges the Comptroller's reliance on *Camp* by arguing (Pet. 13-14) that IRA trusts are not bona fide trusts. This claim is entirely without merit. Congress itself has prescribed that an IRA is a "trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" (26 U.S.C. 408(a)). ERISA accordingly imposes a range of fiduciary obligations on the bank as an IRA trustee: the bank is prohibited from self-dealing and has specific reporting requirements (see 26 U.S.C. 408(a)(5) and (i), 4975(c)), and the bank as trustee must distribute IRA trust assets in conformity with the settlor's plan in the event of the settlor's death (26 U.S.C. (& Supp. II) 401(a)(9), 408(a)(6)), a recognized trust obligation. See 1 A. Scott, *The Law of Trusts* § 8, at 75 (3d ed.1967).[9] Similarly, the common law imposes numerous fiduciary obligations on the bank as trustee for

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[8] The existence of longstanding regulations specifically authorizing bank collective investment of trust funds (see page 2, *supra*) disproves petitioner's claim (Pet. 3) that the Comptroller has reversed over 50 years of administrative practice. Petitioner is similarly misguided in finding relevance (Pet. 14-15 n.21) in the fact that banks waited eight years after the passage of ERISA to offer their common trust fund services to IRA customers. Prior to 1982, IRAs could be opened only by persons not already covered by a pension plan. IRA common trusts therefore were too small to be operated profitably. When IRA rules were liberalized in 1981, banks promptly offered their common trust services to IRA customers.

[9] Petitioner's claim that the common trust fund here is "identical * * * to *Camp*" (Pet. 6) thus disregards the fact that an IRA common trust, unlike the mutual fund in *Camp*, is a bona fide trust. See *Camp*, 401 U.S. at 622 n.8. Nor does petitioner advance its cause by repeatedly (Pet. 3, 5, 6, 7, 9, 13, 15) arguing that the Glass-Steagall Act pro-

an IRA, including a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with beneficiaries. See Restatement (Second) of Trusts §§ 170, 174, 183 (1959). The role of the banks here is thus far different from the one considered in *Camp*, where the bank acted solely as a managing agent for the accounts of its customers. See *Camp*, 401 U.S. at 622. See generally A. Scott, *supra*, §§ 8-8.1.

ERISA also contains statutory limitations to ensure that IRA trusts are used solely "for retirement savings" (S. Rep. 93-383, 93d Cong., 1st Sess. 132 (1973)), rather than for investment purposes. ERISA thus goes beyond the usual "prudent investment" rule common to the law of trusts and specifically prohibits the investment of IRA funds in instruments that are inconsistent with a retirement purpose. See 26 U.S.C. 408(a)(3) and (m) (barring investment in life insurance contracts or collectibles). IRA contributions are limited to $2,000 annually. See 26 U.S.C. 408(a)(1). Withdrawals from the trust before age 59½ are subject to a 10% penalty. See 26 U.S.C. 219(b), 408(f). Given this intricate and complex congressional and common law scheme designed to ensure that IRAs serve exclusively as retirement trusts, there is no basis for contesting the Comptroller's determination that IRAs are bona fide trusts.[10]

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hibits a bank from operating a mutual fund. It is plain that the bank here is offering fiduciary services—a permissible banking activity—and is not operating a mutual fund.

[10] Petitioner suggests that the individual IRA trusts are somehow not bona fide because they are "standardized, preprinted forms" (Pet. 13, 15). But use of standardized trusts in no way interferes with or minimizes the numerous common law and statutory fiduciary obligations placed on the bank as trustee. Indeed, Congress, when it enacted ERISA, clearly knew that it would be necessary for banks to use standardized IRA trust forms. Congress explained that the IRS was preparing a prototype IRA trust and that failure to use this prototype would require prior approval. See H.R. Conf. Rep. 93-1280, 93d

3. Petitioner raises numerous other arguments in favor of review. All are without merit.

a. Petitioner argues that this case raises "basic questions" about the authority of federal agencies to "rewrite Acts of Congress" (Pet. 15), and that the Comptroller's decision represents the substitution of his views for those of Congress. As the District of Columbia Circuit recognized, "this is not a fair reading of the Comptroller's opinion" (Pet. App. 22a). The Comptroller's detailed and careful analysis (*id.* at 39a-90a) reveals that his decision was based on this Court's decision in *Camp*, which indicated that bank trust activities are fully consistent with the Glass-Steagall Act. There accordingly is no basis for petitioner's assertion that the Comptroller substituted his views for those of Congress.[11]

Cong., 2d Sess. 338 (1974). Petitioner's attempt to buttress this contention by referring (Pet. 14-15) to custodial IRA accounts is unavailing; such accounts are not at issue in this case.

[11] Petitioner errs in relying (Pet. 16 & n.24) on Congress's failure to enact certain amendments to the Glass-Steagall Act to support its assertion that the Comptroller has usurped congressional authority. First, Congress's failure to enact legislation is a notoriously unreliable indicator of congressional intent. See *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 803-804 n.25 (1984); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946). In any event, the proposed legislation petitioner cites did not deal with the issue presented in this case; rather, it would have allowed banks to commingle funds for investment purposes—in effect overruling the result in *Camp*. Finally, petitioner fails to note that *it* has unsuccessfully sought legislation to restrict banks' ability to invest funds collectively for IRA, Keogh, and other retirement plans. See *Bank Holding Company Legislation and Related Issues: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking*, 96th Cong., 1st Sess. Pt. 2 1032, 1034-1035 (1979) (statement of Matthew Fink, General Counsel for the Investment Company Institute).

Petitioner attempts to buttress its claim that the Glass-Steagall Act is being administratively repealed by citing (Pet. 18-19 nn.26-30) other regulatory actions taken by the banking agencies and the SEC, and

b. Petitioner next argues (Pet. 16-17) that the Comptroller (and the courts) substituted an ad hoc assessment of the riskiness of the bank activities at issue for the restrictions imposed by Congress. Again, "this is * * * a mischaracterization of the Comptroller's ruling" (Pet. App. 22a). The Comptroller simply followed the lead set by this Court in *Camp* (401 U.S. at 620-629) in determining whether the risks posed by the challenged activities implicate the concerns that underlay the Glass-Steagall Act. And the Comptroller properly concluded (Pet. App. 44a-45a), as did the Court in *Camp,* that the hazards that the Glass-Steagall Act sought to eliminate "are not present when a bank undertakes * * * to commingle assets which it has received for a true fiduciary purpose rather than for investment" (*Camp*, 401 U.S. at 638). In light of *Camp*, the Comptroller's reasoning is unassailable.

In these circumstances, the Comptroller has set forth his reading of the statute with "commendable thoroughness." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 216 (1984).[12] The courts of appeals properly deferred

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other pending Glass-Steagall litigation. The issues raised in these other fora, however, have nothing to do with the resolution of the Glass-Steagall issue in this case; and, as noted above, the SEC has taken no position on whether banks may offer these services under the Glass-Steagall Act (see Pet. App. 106a).

[12] Petitioner argues (Pet. 17) that the Comptroller has adopted a regulatory approach under the Glass-Steagall Act that runs afoul of 12 U.S.C. 93a. But that statute does not deny the Comptroller the authority to interpret the Glass-Steagall Act. Rather, it was enacted to make clear that the Comptroller lacks the authority "to permit otherwise impermissible activities of national banks with specific reference to the * * * Glass-Steagall Act * * *." H.R. Conf. Rep. 96-842, 96th Cong., 2d Sess. 83 (1980). See 126 Cong. Rec. 6901-6902 (1980). As *Camp* demonstrates, the Comptroller here has conferred no such novel authority on national banks.

to his reading of the statute. See *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 7; *Board of Governors* v. *Investment Company Institute*, 450 U.S. at 68.[13] Further review accordingly is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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[13] Contrary to petitioner's claims (Pet. 9, 20), the courts of appeals correctly applied the well established standards for judicial review of agency action. See Pet. App. 14a-23a; 86-153 Pet. App. 3a; 86-154 Pet. App. 5a. Petitioner also argues (Pet. 22 n.34) that deference to the Comptroller was inappropriate because his litigation counsel repudiated the reasoning of his opinion. To support this assertion, petitioner contends that the Comptroller's decision recognized that the definition of securities in the Glass-Steagall Act and Securities Act "are 'synonymous,' " but that the Comptroller later abandoned that position in litigation. The record, however, flatly refutes this contention. The Comptroller's decision specificially states that "[t]his Office has viewed the meaning of the term 'securities' under the securities laws as *not necessarily synon[y]mous* with its meaning under the Glass-Steagall Act" (Pet. App. 44a (emphasis added)). He has adhered to this position throughout this litigation.

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